Supreme Court, U.
FILED
MAY 30 1980
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-900

FEDERAL TRADE COMMISSION, ET AL.,
Petitioners

—*v.*—

STANDARD OIL COMPANY OF CALIFORNIA

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 10, 1979
CERTIORARI GRANTED FEBRUARY 25, 1980

INDEX TO APPENDIX *

	Page
Docket Entries	1
Complaint with exhibits	3
Motion to dismiss the complaint	50
Portion of Proceedings in the United States District Court, Northern District of California, held on September 26, 1975	51
Opinion of the United States Court of Appeals for the Ninth Circuit	53
Order of the Supreme Court granting the petition for a writ of certiorari, February 25, 1980	67

* The order of the district court dismissing the complaint and the order of the court of appeals denying the petition for rehearing are reproduced at Pet. App. 1a-2a, and 23a-24a, respectively.

DOCKET ENTRIES

STANDARD OIL COMPANY OF CALIFORNIA, PLAINTIFFS

—*v.*—

FEDERAL TRADE COMMISSION, LEWIS A. ENGMAN, Chairman, PAUL RAND DIXON, Member, MAYO J. THOMPSON, Member, MARY ELIZABETH HANFORD, Member, STEPHEN A. NYE, Member, DEFENDANTS

DATE	PROCEEDINGS
1975	
May 1	Filed complt . . . iss summs Filed pltf's 1st Req for Prod., inspect & copying of docs
May 20	Filed summs on ret exec as to U.S.A. unexec as to other defts
Jul 3	Filed deft's Memo of Pts & Auths in Supp of Mo to Dism Filed deft's Resp to First Req of pltf for Prod, Inspection, & Copying of Docs
Jul 9	Filed Letterrescheduling hrg date of 7-25-75 to 9-12-75/11:00 am
Aug 15	Filed Brief of Pltf in Supp of ITS Req for Prod of Docs and In Ans to Defts' Resp Thereto Filed Brief of Pltf in Opp to Defts' Mo to Dism and in Supp of its Complt
Sep. 2	Filed Stip and Ord that hrg on defts' Mo to Dism be cont to 9-26-75
Sep 11	Filed defts' Reply Memo of Pts & Auths in Supp of defts' Mo to Dism
Sep 26	ORD: deft's mo to dism GRANTED: deft to prepare Ord—LHB
Oct 3	Filed ORDER: complaint & action are DISMISSED w/out costs—LHB

DATE	PROCEEDINGS

1975

Nov 26 Plaintiff's NOTICE OF APPEAL from Order of 10-3-75

Dec 1 mailed notice to counsel & 9th CCA

Dec 8 Designation of Record on Appeal
Order for Reporter's Transcripts by appellant

Dec 9 Record designated by appellee

Dec 16 Stipulation correcting reporter's transcript.

Dec 18 Reporter's Transcript of 9-26-75 in an original & 1 copy

Dec 19 Mailed record to 9th CCA

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.

ATTEST:

Clerk, U.S. District Court
Northern District of California

By /s/ Carol [Illegible]
Deputy Clerk

Dated Dec. 19, 1975

PILLSBURY, MADISON & SUTRO
TURNER H. MCBAINE
WALLACE L. KAAPCKE
GEORGE A. SEARS
RICHARD W. ODGERS
225 Bush Street
San Francisco, California 94104
Telephone: (415) 983-1000
Attorneys for Plaintiff

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 75 0860 LHB

[Filed May 1, 2:33 PM, 1975]

STANDARD OIL COMPANY OF CALIFORNIA, PLAINTIFFS

vs.

FEDERAL TRADE COMMISSION; LEWIS A. ENGMAN, Chairman; PAUL RAND DIXON, Member; MAYO J. THOMPSON, Member; MARY ELIZABETH HANFORD, Member; STEPHEN A. NYE, Member, DEFENDANTS

COMPLAINT FOR DECLARATORY RELIEF

STANDARD OIL COMPANY OF CALIFORNIA (SOCAL) states the following claims for declaratory relief against the *FEDERAL TRADE COMMISSION* and its chairman and members (the Commission or FTC):

JURISDICTION AND VENUE

1. This is a civil action for declaratory relief arising under the Fifth Amendment to the Constitution of the United States, section 5 of the Federal Trade Commission Act (15 U.S.C. § 45), the Declaratory Judgment Act (28 U.S.C. §§ 2201, et seq.) and the Administrative Procedure Act (5 U.S.C. §§ 551, et seq.). The matter in controversy exceeds the sum of $10,000, exclusive of

interest and costs. The Court has jurisdiction of this proceeding under sections 1331, 1337, 1346, 1361 and 2201 of Title 28 of the United States Code, and section 704 of Title 5 of the United States Code.

SOCAL contends that the Commission issued a complaint against it in FTC Docket No. 8934 under congressional pressure without reason to believe that SOCAL had committed a violation of section 5 of the Federal Trade Commission Act; that, in so doing, the Commission denied SOCAL due process of law and violated statutory obligations imposed upon the Commission by section 5 of the Federal Trade Commission Act and section 10(e) of the Administrative Procedure Act; that SOCAL has exhausted its administrative remedy; that SOCAL has no judicial remedy other than this proceeding to protect its substantial rights and secure a declaration that the Commission must adhere to the requirements of law in issuing a complaint; that relief herein is essential to prevent the imposition of heavy and improper expense and burdens on SOCAL, and the prospective misuse of millions of dollars of Federal funds in prosecution by the FTC of an action not lawfully initiated.

2. This proceeding is properly brought in this Court under provisions of section 1391 of Title 28 of the United States Code.

THE PARTIES

3. Plaintiff SOCAL is a corporation organized and existing under the laws of the State of Delaware with its principal headquarters at 225 Bush Street, San Francisco, California.

4. The Federal Trade Commission is an agency of the United States organized and existing pursuant to the Federal Trade Commission Act (15 U.S.C. §§ 41, et seq.) with its principal office in Washington, D.C. Defendant Engman is Chairman and defendants Dixon, Thompson, Hanford and Nye are members of the Federal Trade Commission.

FIRST CLAIM FOR RELIEF: DENIAL OF DUE PROCESS OF LAW

5. On July 18, 1973, the FTC issued a complaint in Docket No. 8934 (copy attached hereto as Exhibit A), naming SOCAL together with Exxon Corporation, Texaco, Inc., Gulf Oil Corporation, Mobil Oil Corporation, Standard Oil Company (Indiana), Shell Oil Corporation and Atlantic Richfield Company as respondents, and charging them under section 5 of the Federal Trade Commission Act (15 U.S.C. § 45), with alleged combination or agreement to monopolize the refining of crude oil into petroleum products in the relevant market (compl., par. 20), and subsidiarily with alleged maintenance of monopoly power over and alleged restraint of trade and maintenance of a noncompetitive market structure in the refining of crude oil (compl., pars. 21, 22).

The complaint issued without a proposed order specifying what relief the Commission sought. FTC complaint counsel and others of the FTC staff have asserted that the FTC seeks a drastic "restructuring" of the petroleum industry, including a divestiture of refinery and pipeline facilities of respondents worth hundreds of millions of dollars, at a time in history when the adequacy and continuity of supplies of gasoline, heating oil and other petroleum products are matters of great national concern.

6. Section 5(a) of the Federal Trade Commission Act (15 U.S.C. § 45) declares that unfair methods of competition and unfair or deceptive acts or practices in commerce are unlawful. Section 5(b) of the Federal Trade Commission Act authorizes the issuance of a complaint by the Commission subject to compliance with these statutory requirements:

> "Whenever *the Commission shall have reason to believe* that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve

upon such person, partnership, or corporation a complaint stating its charges in that respect * * *" (emphasis added).

7. The FTC has been granted broad investigatory powers to enable it to satisfy the jurisdictional requirement of "reason to believe" imposed upon it by section 5 of the Federal Trade Commission Act, including the power to "require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation" (15 U.S.C. § 49).

8. Section 5 of the Federal Trade Commission Act incorporates the reason-to-believe requirement in order to ensure that the heavy burdens suffered by a respondent as a result of institution of a complaint proceeding will not be thrust upon it unless there exists a substantial and demonstrable basis for reasonable belief by the Commission that a violation of section 5 of the Federal Trade Commission Act may have occurred.

9. On January 2, 1974, SOCAL filed a motion in the FTC proceeding asking, among other relief, that the FTC complaint be withdrawn or dismissed without prejudice on the ground that a pending investigation of the petroleum industry had been prematurely terminated by the FTC under congressional pressure, and that the complaint had been issued by the Commission without compliance with the reason-to-believe requirement of section 5 of the Federal Trade Commission Act and in violation of SOCAL's right to due process of law under the Fifth Amendment to the Constitution of the United States.

10. On February 1, 1974, the Administrative Law Judge certified the said motion of SOCAL to the Commission for decision. On February 12, 1974, the FTC denied the certified motion. On February 20, 1974, SOCAL applied for reconsideration on the ground, inter alia, that the Commission had denied the motion prior to receipt of SOCAL's supporting memorandum.

11. SOCAL's application for relief was based upon the following circumstances, among others:

(a) On December 21, 1971, the FTC issued a resolution stating its intention to institute an investigation of

firms in the petroleum industry to determine whether such firms were engaged in unfair methods of competition or unfair acts or practices in violation of section 5 of the Federal Trade Commission Act (Docket No. 721-0047). For 17 months thereafter the FTC made no effort directly to investigate the acts and practices of SOCAL, either through examination of its officers and employees, or by review of its documents, books and records.

(b) On May 31, 1973, 17 months after the FTC issued its resolution, but before any direct investigation of SOCAL, the Honorable Henry M. Jackson, as Chairman of the Senate Interior and Insular Affairs Committee and of the Permanent Investigations Subcommittee of the Senate Committee on Government Operations, sent a letter to defendant Lewis A. Engman, Chairman of the Federal Trade Commission, making this request:

> "I am hereby requesting the Federal Trade Commission to prepare a report within thirty days regarding the relationship between the structure of the petroleum industry and related industries and the current and prospective shortages of petroleum products."

(c) One day later, on June 1, 1973, the FTC issued subpoenas in Docket No. 721-0047, directing the attendance of three officers of the SOCAL organization to testify on June 26, 28 and 29, 1973. The testimony of these three officers constitutes the only direct investigation of SOCAL the FTC conducted pursuant to its December 1971 resolution in Docket No. 721-0047.

(d) On June 27, 1973, before the FTC had furnished to Senator Jackson the report requested by him, before the three subpoenaed SOCAL officers had testified, and before there had been any examination of SOCAL documents, books and records, The Evening Star and The Washington Daily News published an article with the headline "8 Oil Firms Face FTC Action" (copy attached hereto as Exhibit B). The article, based upon "congressional sources," stated in part:

"The Federal Trade Commission is prepared to recommend antitrust action against the eight major oil firms in light of the ongoing energy shortage, congressional sources have disclosed.

"The commission, after more than a year of investigating oil industry practices it feels may have contributed to the shortage, has drawn up a plan which will recommend divestiture of key oil functions in order to make the industry more competitive.

"FTC staffers, who have been studying oil and gas shortages at the request of Congress, will present their study and a proposed antitrust case to the full commission on July 1.

"At the same time, they will make their findings available to Sen. Henry Jackson, D-Wash., who has pressured the FTC to make public its findings on the oil and gas crisis."

(e) On July 6, 1974, less than 10 days later, the FTC issued a subpoena duces tecum directing SOCAL to produce certain corporate books and records. On the same day, July 6, 1974, and without having made any examination of any SOCAL documents, or of its officers or employees except as noted above, Chairman Engman transmitted to Senator Jackson an undated report entitled "Preliminary Federal Trade Commission Staff Report on Its Investigation of the Petroleum Industry." In his letter of transmittal to Senator Jackson (copy attached hereto as Exhibit C), Chairman Engman said:

"*This report has not been evaluated or approved by the Commission,* and the findings and conclusions contained in the report do not necessarily reflect the views of the Commission.

"While the Commission recognizes its obligation to honor your Committee's request for information, I must emphasize that the Commission would not make this report public and therefore we ask that care be taken to avoid unnecessary publicity which could jeopardize any future law enforcement action by the Commission in this area" (emphasis added).

(f) Senator Jackson responded by letter dated July 9, 1973, that the Preliminary FTC Staff Report would be published as a congressional committee print unless Chairman Engman furnished by July 13, 1973, "specific reasons why the release of this report would jeopardize future legal action by the Commission."

(g) On July 11, 1973, Chairman Engman replied (copy attached hereto as Exhibit D), stating that the Preliminary Staff Report was "an internal staff memorandum prepared in the context of a currently pending investigation," and that

> "The Commission recognizes its obligation to honor the legitimate requests of congressional committees for information. Disclosure of such a document to Congress, however, must be contrasted with its public release, which the Commission views as inconsistent with *its duty to proceed judiciously and responsibly in determining what, if any, action should be taken on the basis of the staff investigation*" (emphasis added).

thereby clearly implying that the Commission had not yet made its determination as to what, if any, action should be taken on the basis of the staff report.

(h) On July 13, 1973, Senator Jackson released the Preliminary FTC Staff Report for publication as a committee print. The Report as published by the Senate Committee on Interior and Insular Affairs states that it was "Prepared at the Request of" Senator Jackson.

(i) Under date of the second business day thereafter, July 17, 1973, the Commission issued a News Release stating that

> "The Federal Trade Commission today issued a complaint against the nation's eight largest petroleum companies, alleging that they have combined or agreed to monopolize refining, maintained monopoly power over refining, and maintained a noncompetitive market structure in refining, in the Eastern and Gulf coast states and in parts of the mid-continent area."

This News Release was issued only 11 days after Chairman Engman's statement to Senator Jackson (on July 6, 1973), that the Preliminary Staff Report "has not been evaluated or approved by the Commission," and only 6 days after his statement to Senator Jackson (on July 11, 1973) that the Commission had not yet taken action on the Report, and had a duty to proceed judiciously and responsibly in doing so.

(j) On July 18, 1973, the complaint was issued under the official seal of the Secretary of the Commission bearing that date.

(k) In an article on March 16, 1975 (copy attached hereto as Exhibit E), the New York Times stated that the charge "that the F.T.C. case was politically inspired * * * finds some support in the events of early summer 1973" after the winter shortage of heating oil and the spring shortage of gasoline:

> "Senator Henry M. Jackson, Democrat of Washington, then and now a Presidential aspirant, publicly prodded the trade commission to say when it would report the results of its investigation of the structure of the oil industry.
>
> *"Once the report was out, Congressional sources other than Senator Jackson said that the commission was under great political pressure to file a complaint. It did so on July 17, 1973"* (emphasis added).

12. Events after issuance of the complaint confirm that the FTC acted in violation of the statutory requirement of section 5 of the Federal Trade Commission Act in issuing the complaint. Among the circumstances which so demonstrate are the following:

(a) The issuance of the FTC complaint aroused the immediate concern of Federal agencies and officials charged with responsibility for oil supply and energy problems. On August 27, 1973, the Office of the Energy Advisor of the Department of the Treasury sent to the Deputy Secretary of the Treasury and to the President's Oil Policy Committee an analysis of the FTC complaint and of the Preliminary FTC Staff Report. The Office of

the Energy Advisor included the following among its conclusions (copy attached hereto as Exhibit F):

> "The FTC report's implication that the current shortages of petroleum are deliberately contrived by the major oil firms is incorrect. The companies have merely been responding to Government laws and policies, and these laws and policies have been the real culprits. The solution, therefore, is not divestiture, but rather a change in laws and policy.
>
> "The Federal Trade Commission should reconsider its action and withdraw the complaint issued against the eight largest oil companies."

(b) Senator Jackson asked the Commission to make available to his congressional subcommittee the evidence which was claimed to support issuance of the complaint. On August 30, 1973, the Commission responded that it would furnish to the subcommittee "[a]ll evidence obtained by the Commission as a result of its investigation which led to issuance of the complaint on July 18, 1973, *In the matter of Exxon, et al.*, Docket No. 8934, and which evidence now comprises the investigational files underlying the adjudication of this matter." On January 23, 1974, in a statement made at the conclusion of energy crisis hearings before the Permanent Subcommittee on Investigations (copy attached hereto as Exhibit G), Senator Jackson stated that "these hearings have not turned up any hard evidence that the major oil companies deliberately created the crisis—either in parallel or in concert."

(c) In the meantime, in the FTC proceedings, the Administrative Law Judge issued on November 23, 1973 an order which, among other things, required FTC complaint counsel to file lists of witnesses and documents. FTC complaint counsel did not comply but instead filed on December 7, 1973 "comments" asserting that such requirements were "inappropriate," and submitted a proposal for a program of first, second and third "waves" of discovery by FTC complaint counsel. The "first wave" of such discovery program was to consist of depositions of controllers of the respondent oil companies to determine the nature and location of their corporate records.

(The FTC's investigative subpoena duces tecum to obtain SOCAL books and records in Docket No. 721-0047 was quashed on July 27, 1973, by reason of commencement of the adjudicative proceeding in Docket No. 8934; SOCAL has not been required to produce any documents, books or records in Docket No. 721-0047 or Docket No. 8934.) The proposed discovery program of FTC complaint counsel in Docket No. 8934 was and is a patent effort to renew the incomplete, insufficient and prematurely terminated FTC investigation of the petroleum industry.

On December 10, 1973, the Administrative Law Judge issued an order granting FTC complaint counsel an extension of time, and on February 7, 1974, the Administrative Law Judge issued an order requiring FTC complaint counsel to furnish their lists of witnesses and documents by April 8, 1974.

On April 8, 1974, FTC complaint counsel filed their purported lists of witnesses and documents. FTC complaint counsel listed as witnesses five economists on the FTC staff. Complaint counsel did not list any witness whose testimony was taken or who was interviewed in the investigation which, according to the Commission, "led to issuance of the complaint on July 18, 1973." Complaint counsel did not list a single document obtained during that investigation.

(d) On April 18, 1974, respondents moved for a preclusion order to limit FTC complaint counsel to use of the witnesses and documents thus listed. In their opposition filed May 7, 1974, FTC complaint counsel made the following admissions, all of which are inconsistent with existence of genuine basis for reason to believe the complaint should issue as required by section 5 of the Federal Trade Commission Act: (1) that they "had no intention whatever regarding specific evidence to be used at trial"; (2) that, after "review [of] all material in [their] possession," complaint counsel "still do not have a single witness that [they] intend to call at trial"; and (3) that "the great majority of documents which we expect to offer at trial are not in our possession but will be obtained through our forthcoming discovery." The

Administrative Law Judge denied the preclusion motion on June 20, 1974, after the Commission denied reconsideration of SOCAL's motion for dismissal or withdrawal of the complaint on June 4, 1974.

13. In its order of June 4, 1974 refusing to dismiss the complaint for noncompliance with the reason to believe requirement of section 5 of the Federal Trade Commission Act (copy attached hereto as Exhibit H), the Commission asserted:

> "And it has long been settled that *adequacy of the Commission's 'reason to believe' a violation of law has occurred* and its belief that a proceeding to stop it would be in the 'public interest' are matters that go to the mental processes of the commissioners and *will not be reviewed by the courts.* Once the commission has resolved these questions and issued a complaint, the issue to be litigated is not the adequacy of the commission's pre-complaint information or the diligence of its study of the material in question but whether the alleged violation has in fact occurred. That is the posture of the instant matter" (emphasis added).

That order of the Commission, and the subsequent refusal of the Commission to withdraw or dismiss the complaint without prejudice as thereafter suggested by the Administrative Law Judge, give rise to the controversy for which relief is sought in this Court.

14. On October 18, 1974, FTC complaint counsel filed a motion for "major integrated procedural relief," asking the Commission to adopt, for purposes of the said proceeding, various of the discovery rules of the Federal Rules of Civil Procedure in place of the Commission's rules applicable in the proceeding; to adopt the Manual for Complex Litigation in Federal courts as a guide for conduct of the proceeding; and to appoint a second administrative law judge to rule upon discovery matters in the proceeding.

Complaint counsel asserted that while "hundreds of depositions will undoubtedly be necessary" and "the witnesses and deponents in this case may run into the thou-

sands" and "complaint counsel's discovery alone is anticipated to encompass literally millions of documents," the problem was that "[t]*he Rules of Practice of the Federal Trade Commission have crippled this proceeding*" (FTC complaint counsel mem. in support of motion, Oct. 18, 1974, pp. 2, 6, 49, emphasis added). The New York Times stated on March 16, 1975 (Exhibit E hereto) that "pursuit of a precomplaint investigation, including taking sworn testimony in so-called investigative hearings, would have given the staff greater freedom of discovery than the rules permit once a complaint is issued."

Complaint counsel concluded their said motion with the declaration that "[t]he *Exxon* case goes to the very fabric of American industry, exploring heretofore untouched areas vital to the national interest" (mem., p. 67), and requested that the motion be certified to the Commission on an expedited basis.

SOCAL agrees that the complaint does indeed attack operations "vital to the national interest," and avers that there is extraordinary reason for judicial review of the purported basis for issuance of the complaint as against SOCAL.

15. On October 23, 1974, the Administrative Law Judge certified the said motion to the Commission without recommendation, although Rule 3.22(a) of the FTC Rules of Practice and Procedure specifies that he shall certify "with his recommendation" any motion upon which he lacks authority to rule. The Administrative Law Judge stated:

> "The continuation, within the existing adjudicative framework, of the 'discovery' proposed by complaint counsel poses serious problems that require resolution. *In view of these circumstances, the Commission may want to consider, as an alternative, the withdrawal of this case from adjudication—that is, dismissal without prejudice—so that it may be more fully investigated without the restrictions imposed by the existing rules governing adjudicative proceedings.* This would avoid or minimize many of the problems about which complaint counsel are concerned. Because this is a determination resting

within the administrative discretion of the Commission, the administrative law judge expresses no opinion as to which course of action is preferable" (emphasis added).

On March 4, 1975, the Commission declined to adopt the suggestion of the Administrative Law Judge to withdraw or dismiss the complaint in the proceeding, and it denied complaint counsel's motion in all respects.

The refusal of the Commission to withdraw or dismiss the complaint left SOCAL without further avenue of relief from the Commission on the lack of basis for issuance of the complaint as against SOCAL.

16. There is an actual controversy between SOCAL and the FTC. SOCAL contends that (a) the FTC does not have unbridled power to institute proceedings—it is not and cannot be the law that, as the Commission asserts, "adequacy of the Commission's 'reason to believe' a violation of law has occurred * * * will not be reviewed by the courts"; (b) under section 5 of the Federal Trade Commission Act a complaint cannot issue as a matter of statutory requirement unless the Commission has reason to believe that a violation of section 5 has occurred; (c) the Commission cannot have such reason to believe unless it is in possession of facts reasonably warranting such relief; (d) it is the duty of the Commission under said statutory requirement to ascertain and to consider the relevant facts; (e) as demonstrated by the administrative record, at the time it authorized the issuance of the complaint the Commission did not possess facts sufficient to warrant a reasonable belief that SOCAL may be violating section 5 of the Federal Trade Commission Act; (f) as demonstrated by the administrative record, the Commission did not exercise the required discretion and reasonably consider the facts in issuing the complaint as to SOCAL; (g) in issuing the complaint the Commission improperly considered congressional pressures and political and economic factors extraneous to any alleged violation of section 5 of the Federal Trade Commission Act; and (h) in the circumstances, issuance of the complaint in Docket No. 8934 was not lawful and proper as to SOCAL.

17. By reason of the foregoing, the FTC has arbitrarily, unlawfully and capriciously issued the complaint in Docket No. 8934, has abused the discretion vested in it by section 5 of the Federal Trade Commission Act, has violated obligations imposed on it by section 10(e) of the Administrative Procedure Act, has denied SOCAL the due process of law guaranteed to it by the Fifth Amendment to the Constitution of the United States, and therefore the complaint must be withdrawn or dismissed by the Commission.

18. SOCAL has exhausted its administrative remedy before the Commission. The Commission's order of June 4, 1974, denying dismissal of the complaint for noncompliance with the reason to believe requirement was clear and its effect on SOCAL is immediate and concrete, and the same is true of the Commission's order of March 4, 1975, refusing to withdraw the complaint as the Administrative Law Judge suggested. The case would impose costs in the millions of dollars upon the FTC and the taxpayers who provide the funds for its operations. The case would impose massive expenses upon SOCAL (and other respondents), together with incalculable burdens related to interruption of normal business operations when oil supplies are of national concern.

No effective review of the Commission's said orders would be available on ultimate review in a court of appeals of an order to cease and desist entered in the proceeding after many years and at great cost. SOCAL has no judicial remedy to secure review of the important administrative law issue at hand except this proceeding for declaratory relief in this Court.

SECOND CLAIM FOR RELIEF: VIOLATION OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT

19. Plaintiff incorporates by reference paragraphs 1 through 18 of the complaint.

20. By issuing the complaint in Docket No. 8934 without reason to believe that a violation of the Federal Trade Commission Act had occurred, the FTC failed to

comply with the statutory requirements of section 5(b) of the said Act (15 U.S.C. § 45).

THIRD CLAIM FOR RELIEF: VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT

21. Plaintiff incorporates by reference paragraphs 1 through 20 of the complaint.

22. By reason of the acts and omissions set forth in preceding paragraphs, the Commission issued the complaint in Docket No. 8934 in violation of the statutory requirements of section 10(e) of the Administrative Procedure Act (5 U.S.C. § 706), which specifies that agency action which is arbitrary, capricious or an abuse of discretion, or which is in excess of statutory authority, or which is without observance of procedure required by law, is unlawful and must be set aside.

Wherefore, plaintiffs pray that this Court enter a judgment:

(1) declaring that issuance of the complaint in Docket No. 8934 denied SOCAL due process of law in violation of obligations imposed upon the FTC by the Fifth Amendment to the Constitution of the United States;

(2) declaring that issuance of the complaint in Docket No. 8934 was in violation of requirements imposed upon the FTC by section 5 of the Federal Trade Commission Act;

(3) declaring that issuance of the complaint in Docket No. 8934 was in violation of requirements imposed upon the FTC by the Administrative Procedure Act;

(4) declaring that the said complaint must be withdrawn or dismissed by the Commission; and

(5) providing such other and further relief as may be just and proper.

Dated: May 1, 1975.

PILLSBURY, MADISON & SUTRO
TURNER H. MCBAINE
WALLACE L. KAAPCKE
GEORGE A. SEARS
RICHARD W. ODGERS

By /s/ George A. Sears
Attorneys for Plaintiff
225 Bush Street
San Francisco, California 94104

EXHIBIT A

UNITED STATES OF AMERICA

BEFORE
FEDERAL TRADE COMMISSION

Docket No. 8934

IN THE MATTER OF:
EXXON CORPORATION, ET AL.

COMPLAINT

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Docket No. 8934

IN THE MATTER OF
EXXON CORPORATION, a corporation;
TEXACO, INC., a corporation;
GULF OIL CORPORATION, a corporation;
MOBIL OIL CORPORATION, a corporation;
STANDARD OIL COMPANY OF CALIFORNIA, a corporation;
STANDARD OIL COMPANY (INDIANA), a corporation;
SHELL OIL CORPORATION, a corporation; and
ATLANTIC RICHFIELD COMPANY, a corporation

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondents have violated and are now violating Section 5 of the Federal Trade Com-

mission Act (15 U.S.C., Section 45), and believing that a proceeding by it in respect thereof is in the public interest, hereby issues this complaint charging as follows:

I. *Respondents*

1. Respondent Exxon Corporation (Exxon) is a corporation organized, existing and doing business under the laws of the State of New Jersey with its principal office and place of business at 1251 Avenue of the Americas, New York, New York 10020. Exxon is the nation's largest corporation with assets in 1972 exceeding $21.5 billion. In 1972 its sales exceeded $20 billion—second in the nation. Exxon is the nation's largest petroleum company.

2. Texaco Inc. (Texaco) is a corporation organized, existing and doing business under the laws of the State of Delaware with its principal office and place of business at 135 East 42nd Street, New York, New York 10017. Texaco is the nation's third largest corporation with assets in 1972 exceeding $12 billion. In 1972 its sales exceeded $8.6 billion—eighth in the nation. Texaco is the nation's second largest petroleum company.

3. Gulf Oil Corporation (Gulf) is a corporation organized, existing and doing business under the laws of the State of Pennsylvania with its principal office and place of business at the Gulf Building, Pittsburgh, Pennsylvania 15230. Gulf is the nation's sixth largest corporation with assets in 1972 exceeding $9.3 billion. In 1972, its sales exceeded $6.2 billion—eleventh in the nation. Gulf is the nation's third largest petroleum company.

4. Mobil Oil Corporation (Mobil) is a corporation organized, existing and doing business under the laws of the State of New York with its principal office and place of business at 150 East 42nd Street, New York, New York 10017. Mobil is the nation's seventh largest corporation with assets in 1972 exceeding $9.2 billion. In 1972 its sales exceeded $9.1 billion—seventh in the nation. Mobil is the nation's fourth largest petroleum company.

5. Standard Oil Company of California (Standard of California) is a corporation organized, existing and doing business under the laws of the State of Delaware

with its principal office and place of business at the Standard Oil Building, 225 Bush Street, San Francisco, California 94104. Standard of California is the nation's ninth largest corporation with assets in 1972 exceeding $8 billion. In 1972 its sales exceeded $5.8 billion—twelfth in the nation. Standard of California is the nation's fifth largest petroleum company.

6. Standard Oil Company (Indiana) (Standard of Indiana) is a corporation organized, existing and doing business under the laws of the State of Indiana with its principal office and place of business at 910 South Michigan Avenue, Chicago, Illinois 60605. Standard of Indiana is the nation's twelfth largest corporation with assets in 1972 exceeding $6.1 billion. In 1972 its sales exceeded $4.5 billion—fifteenth in the nation. Standard of Indiana is the nation's sixth largest petroleum company.

7. Shell Oil Corporation (Shell) is a corporation organized, existing and doing business under the laws of the State of Delaware with its principal office and place of business at One Shell Plaza, Houston, Texas 77002. Shell is the nation's fourteenth largest corporation with assets in 1972 exceeding $5.1 billion. In 1972 its sales exceeded $4 billion—seventeenth in the nation. Shell is the nation's seventh largest petroleum company.

8. Atlantic Richfield Company (Atlantic Richfield) is a corporation organized, existing and doing business under the laws of the State of Pennsylvania with its principal office and place of business at 717 Fifth Avenue, New York, New York 10020. Atlantic Richfield is the nation's sixteenth largest corporation with assets in 1972 exceeding $4.6 billion. In 1972 its sales exceeded $3.3 billion—twenty-fifth in the nation. Atlantic Richfield is the nation's eighth largest petroleum company.

9. Other petroleum companies, not named as respondents herein, have engaged in some of the acts and practices alleged herein and have contributed to the noncompetitive structure of the petroleum industry, as hereinafter alleged.

II. *The Industry*

10. The petroleum industry is comprised of five basic levels of operation: the exploration and production of crude oil, the transportation of crude oil, the refining of crude oil, the transportation of refined petroleum products and the marketing of refined petroleum products. All respondents are vertically integrated companies and operate at all of the above-mentioned levels.

III. *Relevant Markets*

11. For purposes of this complaint, the relevant market is the refining of crude oil into petroleum products and relevant submarkets thereof.

12. For purposes of this complaint, the relevant geographic market encompasses the Eastern and Gulf Coast states, together with parts of the Mid-Continent area of the United States, and relevant submarkets thereof, in which respondents' conduct in maintaining a noncompetitive market, as alleged herein, has operated to prevent free and open competition.

IV. *Jurisdiction*

13. Except to the extent that competition has been hindered, frustrated, lessened and eliminated by the acts and practices alleged in this complaint, each of the respondents is in substantial competition with each and all of the other respondents and with other petroleum refiners in the refining of crude oil into petroleum products.

14. In the course and conduct of their business, respondents cause and have caused crude oil and petroleum products to be shipped from their facilities in various states to locations in various other states of the United States, and at all times mentioned, maintain and have maintained, a substantial course of trade in crude oil and petroleum products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

V. *Acts and Practices*

15. Since at least 1950, respondents, individually and with each other, have maintained and reinforced a non-competitive market structure in the refining of crude oil into petroleum products in the relevant market.

16. In maintaining and reinforcing the aforesaid non-competitive market structure, respondents, individually and with each other, have been and are engaged in, among others the following acts and practices, some of which, *inter alia*, control and limit the supply of crude oil to independent refiners and potential entrants into refining:

(a) Pursuing a common course of action to abuse and exploit the ownership and control of the means of gathering and transporting crude oil to refineries;

(b) Pursuing a common course of action in participating in restrictive or exclusionary transfers of ownership of crude oil among themselves and with other petroleum companies;

(c) Pursuing a common course of action of adhering to a system of posted prices leading to the maintenance of an artificial level for the price of crude oil;

(d) Entering into numerous processing arrangements with independent refiners thereby expanding their control over refining capacity and limiting the availability of refined petroleum products to independent marketers, and potential entrants into marketing;

(e) Pursuing a common course of action of accommodating the needs and goals of each other in the production, supply and transportation of crude oil to the exclusion or detriment of independent refiners and potential entrants into refining;

(f) Pursuing a common course of action of using their vertical integration to keep profits at the crude level artifically high and profits at the refining level artificially low thereby raising entry barriers to refining;

(g) Pursuing a common course of action to abuse and exploit the ownership and control of the means of transporting refined petroleum products from refineries;

(h) Pursuing a common course of action of accommodating the needs and goals of each other in the transportation and marketing of refined petroleum products to the exclusion or detriment of independent marketers and potential entrants into marketing.

17. Respondents have exercised monopoly power in the refining of petroleum products in the relevant markets by engaging in, among others, the following acts and practices:

(a) Pursuing a common course of action in refusing to sell gasoline and other refined petroleum products to independent marketers;

(b) Pursuing a common course of action in participating in restrictive or exclusionary exchanges and sales of gasoline and other refined petroleum products among themselves and with other petroleum companies;

(c) Pursuing a common course of action in their marketing practices thereby avoiding price competition in the marketing of refined petroleum products.

18. Respondents, individually and with each other, have followed and do follow common courses of action in accommodating the needs and goals of each other throughout the petroleum industry thereby increasing the interdependence of respondents and reducing respondents' incentive to behave competitively.

VI. *Effects*

19. Respondents' acts and practices have had, among others, the following effects:

(a) Respondents have established and maintained artificial price levels for the goods and services rendered at each level of the petroleum industry.

(b) Barriers to entry into the refining of petroleum products have been raised, strengthened and otherwise increased.

(c) Actual and potential competition at all levels of the petroleum industry has been hindered, lessened, eliminated and foreclosed.

(d) The normal response of supply to demand for refined petroleum products has been distorted. Shortages of petroleum products have fallen with particular severity on sections of the country where independent refiners and marketers are primarily located.

(e) The burden of shortages of petroleum products has been forced to fall with particular severity on those sections of the United States, east of the Rockies, where independent refiners and marketers are concentrated thereby eliminating the most significant source of price competition in the marketing of petroleum products and threatening the competitive viability and existence of the independent sector.

(f) Independent marketers have been forced to close retail outlets and significantly curtail retail operations because of their inability to obtain refined product.

(g) Respondents have obtained profits and returns on investment substantially in excess of those that they would have obtained in a competitively structured market.

(h) American consumers have been forced to pay substantially higher prices for petroleum and petroleum products than they would have had to pay in a competitively structured market.

VI. *Violations*

20. The aforesaid acts and practices constitute a combination or agreement to monopolize refining of crude oil into petroleum products in the relevant markets in violation of Section 5 of the Federal Trade Commission Act.

21. Through the aforesaid acts and practices respondents have maintained monopoly power over the refining

of crude oil into petroleum products in the relevant markets in violation of Section 5 of the Federal Trade Commission Act.

22. Respondents, individually and with each other, have restrained trade and maintained a noncompetitive market structure in the refining of crude oil into petroleum products in the relevant markets in violation of Section 5 of the Federal Trade Commission Act.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this 18th day of July, 1973, issues its complaint against said respondents.

NOTICE

Notice is hereby given to each of the respondents hereinbefore named that the —— day of ———— A.D. 19—, at ———— o'clock is hereby fixed as the time and ———————————— as the place when and where a hearing will be had before an administrative law judge of the Federal Trade Commission on the charges set forth in this complaint, at which time and place you will have the right under said Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in this complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the thirtieth (30th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material allegations to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint, and

together with the complaint will provide a record basis on which the administrative law judge shall file an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding. In such answer you may, however, reserve the right to submit proposed findings and conclusions and the right to appeal the initial decision to the Commission under Section 3.52 of the Commission's Rules of Practice for Adjudicative Proceedings.

Failure to answer within the time above provided shall be deemed to constitute a waiver of your right to appear and contest the allegations of the complaint and shall authorize the administrative law judge, without further notice to you, to find the facts to be as alleged in the complaint and to enter an initial decision containing such findings, appropriate conclusions and order.

NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceeding in this matter that the respondents are in violation of Section 5 of the Federal Trade Commission Act as alleged in the Complaint, the Commission may order such relief as is necessary or appropriate in order to correct or remedy the effects of anti-competitive practices engaged in by the respondents and to restore competition in the relevant market or markets.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this, its complaint to be served by its Secretary and its official seal to be hereto fixed at Washington, D.C. this 18th day of July 1973.

By the Commission.

/s/ Charles A. Tobin
CHARLES A. TOBIN
Secretary

[SEAL]

EXHIBIT B

THE EVENING STAR

and

THE WASHINGTON DAILY NEWS

Washington, D.C., Wednesday, June 27, 1973—104 Pages

8 OIL FIRMS FACE FTC ACTION

By BAILEY MORRIS

STAR-NEWS WRITER

The Federal Trade Commission is prepared to recommend antitrust action against the eight major oil firms in light of the ongoing energy shortage, congressional sources have disclosed.

The commission, after more than a year of investigating oil industry practices it feels may have contributed to the shortage, has drawn up a plan which will recommend divestiture of key oil firm functions in order to make the industry more competitive.

FTC staffers, who have been studying oil and gas shortages at the request of Congress, will present their study and a proposed antitrust case to the full commission on July 1.

At the same time, they will make their findings available to Sen. Henry Jackson, D-Wash., who has pressured the FTC to make public its findings on the oil and gas crisis.

THE CASE, Hill sources say, will be a ground-breaking monopoly case as controversial as the one the FTC has issued against the major cereal companies recommending they be broken up in order to reduce prices to consumers and make the industry more competitive.

Companies named in the FTC complaint include: Exxon, Texaco, Gulf Oil, Mobile Oil, Standard Oil of California, Standard Oil of Indiana, Shell Oil and Atlantic Richfield.

The staff-approved antitrust case, being worked out by more than 20 people must be approved by the full commission, sources close to the investigation explained.

Unlike many other FTC antitrust cases, this case is fully backed by the findings contained in the independent study of oil shortages conducted by the FTC's Bureau of Economics the sources said.

HOW STRONG an order the FTC will issue against the oil companies has not yet been determined but it is known that in the past the FTC has considered taking the politically sensitive action of separating the crude oil functions from the retailing and wholesaling functions of the companies.

This would, in effect, spin off control of gasoline stations across the country to a separate company or companies free of constraints imposed by the oil giants.

The FTC has already issued individual complaints against Standard Oil of Ohio (Sohio) and Phillips Petroleum Company.

They are charged in the FTC complaints with placing illegal constraints on their dealers and interfering in neighborhood gas price wars.

THE CASE against Sohio charges the company with fixing the retail price of gasoline in certain areas of the country with the agreement of local retail station owners.

EXHIBIT C

FEDERAL TRADE COMMISSION,
Washington, D.C., July 6, 1973.

Hon. HENRY M. JACKSON,
Chairman, Interior and Insular Affairs Committee, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: As Chairman of the Senate Interior and Insular Affairs Committee and the Senate Permanent Subcommittee on Investigations of the Committee on Government Operations, you have requested a report on the relationship between the structure of the petroleum and related industries and the current shortage of petroleum products.

In response to that request, I am enclosing a copy of a preliminary staff report to the Commission prepared at my direction. This report is based upon the comprehensive investigation of the petroleum industry which the staff began in late 1971. This report has not been evaluated or approved by the Commission, and the findings and conclusions contained in the report do not necessarily reflect the views of the Commission.

While the Commission recognizes its obligation to honor your Committee's request for information, I must emphasize that the Commission would not make this report public and therefore we ask that care be taken to avoid unnecessary publicity which could jeopardize any future law enforcement action by the Commission in this area.

Sincerely yours,

LEWIS A. ENGMAN, *Chairman.*

EXHIBIT D

FEDERAL TRADE COMMISSION,
Washington, D.C., July 11, 1973.

Hon. HENRY M. JACKSON,
Chairman, Senate Permanent Subcommittee on Investigations,
Committee on Government Operations,
U.S. Senate,
Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your letter of July 9, 1973, concerning a Commission staff report on the relationship between the structure of the petroleum and related industries and the current shortage of petroleum products, a copy of which we provided you at your request on July 6.

In my letter accompanying that report, I emphasized that "the Commission would not make this report public and therefore we ask that care be taken to avoid unnecessary publicity ,which could jeopardize any future law enforcement action by the Commission in this area." You ask the Commission to justify this statement, and to identify the specific portions of the report which we feel should not be made public.

The answer to your question lies in the basic role of the Commission as a law enforcement agency charged by Congress with the responsibility for insuring compliance with the antitrust laws, and the fact that the staff report in question is an internal staff memorandum prepared in the context of a currently pending investigation. The Commission recognizes its obligation to honor the legitimate requests of congressional committees for information. Disclosure of such a document to Congress, however, must be contrasted with its public release, which the Commission views as inconsistent with its duty to proceed judiciously and responsibly in determining what, if any, action should be taken on the basis of the staff investigation.

The Commission has always taken the position, therefore, that, as a matter of policy, every effort should be made to prevent unnecessary public disclosure of staff conclusions and recommendations pertaining to matters involving potential Commission law enforcement action.

Please let me know if I can be of further assistance.

Sincerely,

LEWIS A. ENGMAN.

EXHIBIT E

F.T.C. HONING ANTITRUST AXES

By EDWARD COWAN

WASHINGTON—The Federal Trade Commission has decided to propose changes in its rules of practice that could strengthen its ability to bring major antitrust cases such as *Exxon Et Al.*, the pending complaint against eight big oil companies.

If adopted, the new rules, expected to be announced within a few days, would make it much easier for the commission's staff to take depositions from corporate officials in the pretrial "discovery" proceedings that are crucial to the development of a case.

Difficulties and delays with discovery in the Exxon case have caused acute frustration within the commission's Bureau of Competition and have generated some talk that the case may never come to trial.

The new rules, it is hoped, would give fresh momentum to the Exxon effort, which is considered the most ambitious attempt at reorganizing the oil industry since the old Standard Oil Company was split into 34 different units in 1911.

Stephen Nye, a San Francisco antitrust lawyer who joined the commission in June, 1974, said last week in response to an inquiry that the commission had voted 5-to-0 last Tuesday to propose rules "to bring commission adjudicative practice into line with the Federal court practice in discovery proceedings."

Mr. Nye said that in addition to helping with development of antitrust cases the proposed rules "would help in a bait-and-switch carpet case" in which the agency challenges advertising as false or misleading.

An avalanche of corporate comment on the rule proposals is expected, most of it unfavorable. Nevertheless,

Mr. Nye said he hoped the measures would go into effect by midyear.

In the Exxon case, the commission's Bureau of Competition is seeking what economists call "vertical divestiture." At present, the companies involved are integrated. They own oil wells. They own, sometimes, jointly, pipelines that carry the crude to refineries. They own refineries. They own wholesale and resale distribution operations.

They are, in addition to the Exxon Corporation, the Atlantic Richfield Company, the Gulf Oil Corporation, the Mobil Oil Corporation, the Shell Oil Company, the Standard Oil Company of California, the Standard Oil Company of Indiana and Texaco, Inc.

The F.T.C. staff would like to bring about substantial separation in ownership of production, pipelines and refining. A major purpose is to strengthen competition in refining by making it easier for so-called independent refiners to get crude oil for processing into gasoline and other petroleum products.

A complaint alleging that the very structure and habitual practices of the industry, such as swapping oil between companies, were violations of Section 5 of the Federal Trade Commission Act, was filed in July, 1973.

Since then, the case has dragged on at what the staff has regarded as an unbearably slow pace, with F.T.C. lawyers battling oil company lawyers before an administrative law judge over the taking of depositions and other discovery matters.

Last Oct. 18 the staff formally asked the commission to substitute for its own rules of practice, in this case only, the Federal Rules of Civil Procedure.

In a March 6 order, a unanimous commission refused. "As a general principle, the commission does not favor tailoring special rules for individual cases," it said.

The order added that proposed changes in the agency's discovery rules would be published soon, and that the eight oil companies, like anyone else, would be free to comment on them.

If the rules are what the staff hopes, and if they are adopted, the Exxon case could take another eight or 10

years to complete. The staff figures it needs three years to prepare for trial before an administrative law judge—taking depositions from oil company employes, evaluating their testimony, drawing subpoenas for documents, studying those documents and taking another round of depositions.

The trial itself might take a year, it is estimated. The judge would need at least four months, possibly eight,

---

It is about to propose new rules that will make it easier to get the data it needs to prosecute.

---

to write a decision. The companies would almost certainly appeal a negative ruling to the five-member commission. The commission's final order, including a remedy, if a violation is found, could be challenged in the Federal courts, up to the Supreme Court level.

The tone of the Oct. 18 staff motion for simpler discovery procedures, including such terminology as first, second and third "waves" of discovery, conveys the sense of a protracted war against a deeply entrenched enemy.

For their part, the companies have said that the practices and organization complained of actually mean lower prices to consumers. To split up the companies, they have said, would raise prices.

Privately, the companies have said that the F.T.C. case was politically inspired. The charge, while hardly a new form of business defense, finds some support in the events of early summer 1973. The country had experienced a heating-oil shortage in the winter of 1972-73. By spring, gasoline supplies were tight and pump prices rising.

Senator Henry M. Jackson, Democrat of Washington, then and now a Presidential aspirant, publicly prodded the trade commission to say when it would report the results of its investigation of the structure of the oil industry.

Once the report was out, Congressional sources other than Senator Jackson said that the commission was under great political pressure to file a complaint. It did so on July 17, 1973.

Ironically, pursuit of a pre-complaint investigation, including taking sworn testimony in so-called investigative hearings, would have given the staff greater freedom of discovery than the rules permit once a complaint is issued.

Twenty months later, the staff has taken only a handful of depositions. The first subpoenas for documents, directed to the American Petroleum Institute, are returnable tomorrow, and evidently will not be contested.

Congress last year appropriated an extra $1-million for the F.T.C. to be used in compiling a computerized index of the case. In all, the agency estimates that it is spending $2-3 million this year on energy industry work, including $1.6-million for *Exxon Et Al.*

Yet, the staff has been somewhat demoralized by the difficulty of discovery under the present rules.

"Our hands are tied," says a lawyer.

The problem, he explains, is that before it can issue properly drawn subpoenas, the staff must find out how a company keeps its data and files.

If a subpoena for documents is drawn too loosely, it was explained, there are two dangers: the company may drown the staff in millions of pieces of paper, or the administrative law judge may quash the subpoena as being too broad.

The present rules require the staff to show that a particular deposition is "necessary" and that the information cannot be had voluntarily. This is too time consuming, the staff argues, and threatens the very life of a case.

So far, the 20-month struggle between the agency and the industry has centered around procedures, chiefly discovery, not the merits of the complaint.

However, the F.T.C. staff has looked deeply into the complex economics of the oil industry—the oil sharing and exchange arrangements, processing arrangements, joint ownership of pipelines, joint bidding for leases, intense marketing competition followed by retrenchment,

the shift of "profit centers" from production to marketing, the role of depletion, the many types of crudes and the ability of most refineries to process some and not others, and on and on.

From a seemingly infinite number of facts and arguments, commissioners and courts are supposed to decide whether the present structure and practices of the industry are procompetitive or anticompetitive.

It is a formidable task, one that has caused some professional students of antitrust laws to wonder whether the Exxon case is basically nonlitigable.

"It may be that this is really a case for Congress," one lawyer said, "They can make a decision in two weeks."

If not two weeks, perhaps two years. In any event, there are pending in Congress bills that would do what the F.T.C. staff seeks to do—break up the big oil companies.

EXHIBIT F

83rd Congress
1st Session

COMMITTEE PRINT

DEPARTMENT OF THE TREASURY STAFF ANALYSIS

OF THE

PRELIMINARY FEDERAL TRADE COMMISSION STAFF REPORT ON ITS INVESTIGATION OF THE PETROLEUM INDUSTRY, JULY 2, 1973

PRINTED AT THE REQUEST OF

HENRY M. JACKSON, Chairman

COMMITTEE ON INTERIOR AND
INSULAR AFFAIRS
UNITED STATES SENATE

PURSUANT TO

S. Res. 45

A NATIONAL FUELS AND ENERGY
POLICY STUDY

Serial No. 93-18 (92-53)

[EMBLEM]

Printed for the use of the
Committee on Interior and Insular Affairs

U.S. GOVERNMENT PRINTING OFFICE

WASHINGTON : 1973

LETTER OF TRANSMITTAL

DEPARTMENT OF THE TREASURY,
Washington, D.C., August 29, 1973.

Hon. HENRY M. JACKSON,
U.S. Senate,
Washington, D.C.

DEAR MR. CHAIRMAN: On July 12, 1973, you released to the public the Federal Trade Commission's report on its investigation of the petroleum industry. My staff recently completed an analysis of the FTC report and a copy of the analysis is enclosed for your information. You will note that our analysis differs considerably from the FTC's.

Sincerely,

WILLIAM E. SIMON,
Deputy Secretary of the Treasury,
(Chairman, Oil Policy Committee).

STAFF ANALYSIS

of

OFFICE OF ENERGY ADVISOR
DEPARTMENT OF THE TREASURY

For Submission to:

DEPUTY SECRETARY OF THE TREASURY

(Chairman, Oil Policy Committee)

on

The Federal Trade Commission's July 2, 1973

"PRELIMINARY FEDERAL TRADE COMMISSION STAFF REPORT ON ITS INVESTIGATION OF THE PETROLEUM INDUSTRY"

by:

Douglas L. McCullough
Senior Staff Advisor
Date: August 27, 1973

PURPOSE

The purpose of this analysis is to analyze the Federal Trade Commission's July 2, 1973 report of its investigation of the petroleum industry and to consider the practical implications of divestiture of oil refining or producing operations from marketing. Specifically, this analysis will probe what effect divestiture would have on the industry's future investment and the overall effect on the supply of oil.

CONCLUSIONS

1. Many of the facts in the FTC report are inaccurate. Consequently, the resulting conclusions are questionable.

2. Although perhaps unintentional, the FTC report is biased against the largest integrated oil companies. Nothing in the report supports restricting the FTC's complaint to the eight largest oil companies. Why not seven, or ten, or all of the fully integrated oil companies?

3. As a result of this bias, the FTC's final conclusions are incorrect or misleading at best, regarding: (a) the charge that the majors control the output of the independent crude producers; (b) the charge that the majors have engaged in exclusionary practices in their use of exchanges; (c) and the conclusion that the independent sector's welfare is dependent on the well-being of independent refiners.

4. Although there is little question that the continued existence and viability of the independent refiner is important to maintain a healthy petroleum industry, divestiture of refining or producing capability from the large majors is not the best way to protect the independent refiner. Integration of the producing, refining, transporting, and marketing of crude oil and petroleum products has proven to be an efficient method of operation. To meet the demands of 1985, the equivalent of about 60 new refineries averaging a throughput capacity of about 160,000 barrels per day must be constructed. The total investment required by these refineries could be as much as $15 million. A primary requisite for a company (major or independent) considering such an investment is the assurance of a source of crude. Divestiture would work against that assurance.

5. Divestiture would cause the integrated oil companies to consider foreign investments and/or operations as their best course of future action, thus further aggravating U.S. shortages and balance of trade problems.

6. The FTC's complaint against the eight largest integrated oil companies, if successful, would cause con-

siderable adverse impact on future domestic energy supplies.

7. The FTC report's implication that the current shortages of petroleum are deliberately contrived by the major oil firms is incorrect. The companies have merely been responding to Government laws and policies, and these laws and policies have been the real culprits. The solution, therefore, is not divestiture, but rather a change in laws and policy.

8. The Federal Trade Commission should reconsider its action and withdraw the complaint issued against the eight largest oil companies.

EXHIBIT G

BUSINESS POLICIES

STATEMENT BY CHAIRMAN HENRY JACKSON (D-WASH) OF SENATE PERMANENT INVESTIGATIONS SUBCOMMITTEE, JANUARY 23, 1974, AT CONCLUSION OF THREE DAYS OF HEARINGS ON ENERGY CRISIS

(TEXT)

Today concludes three days of hearings directed at finding out whether the United States is truly suffering from a fuel shortage and if so, why. Most Americans seem to believe that the shortage has been contrived by the oil industry in order to raise prices, reduce competition and force a retreat in environmental standards.

The Permanent Investigations Subcommittee has called top officials of the seven largest oil companies to tell their story and, if possible, to refute the widespread suspicions and allegations about the industry's behavior in the current crisis. Unfortunately, we still do not have all the facts.

We do know, however, that the prices of crude oil, gasoline, heating oils and other petroleum fuels have risen by leaps and bounds in the last few months.

We do know that thousands of service stations—branded and unbranded—have closed, and that thousands of others are open only sporadically.

We do know that motorists must waste fuel going from one station to another looking for gasoline, and must at times line up for hours to get less than a full tank. We know that gasoline has become totally unavailable in some parts of the country.

We do know that thousands of workers have been laid off and that whole industries are in distress for lack of fuel.

Despite these signs of shortage, we have determined through this hearing and the questionnaires prepared by

the Subcommittee, that the seven companies stocks of crude oil and refined products were as high or higher at year-end in 1973 as they were one year earlier.

We also know, from the materials submitted to the Subcommittee by the companies themselves, that the nation's distress is extremely profitable to the oil industry. We have learned from their own submissions that the earnings of the seven largest firms increased 46 percent between the first three quarters of 1972 and the first three quarters of 1973, on a sales volume that increased only 6 percent. If we can believe the trade press and the simplest principles of economics, oil industry profits have grown even more spectacularly *since* the third quarter of 1973.

On the other hand, these hearings have not turned up any hard evidence that the major oil companies deliberately created the crisis—either in parallel or in concert. It is clear that they benefit financially from the shortage, but I have found no reason to believe that the companies set about knowingly to create it.

We still do not have the facts to lay these suspicions entirely to rest, however. I believe that the one point that this hearing has brought home clearly is our lack of timely, reliable, complete and credible information about the energy industries.

The Federal Government and the American people do not have adequate information on our domestic energy resources and reserves. We do not have reliable current data on primary crude oil and product stocks, and there is no usable information at all on secondary stocks. Import statistics are covered with confusion and doubt.

The wholesale price statistics of the Federal Government regarding gasoline and fuel oil are not believable or usable, and the companies cannot or will not provide such data.

We know almost nothing about the international pricing and investment policies of the companies. And we do not have even approximate figures on the tax subsidies of the oil industry, much less on the benefits the nation receives in return for these special privileges.

This is information the Congress needs in order to legislate—regarding taxes, regarding leasing of energy resources on the public lands, regarding price regulation and antitrust policy, regarding imports and international investment policy, regarding research and development for alternative energy sources, and regarding measures to cope with the current emergency.

This is information the Executive Branch needs regularly and promptly to discharge its responsibilities, and which the American people need to dispel the cloud of suspicion and resentment that surrounds the present crisis.

Among other things—

—We don't know whether the Federal Government's allocation program is reducing hardships or aggravating them.

—We don't know how high gasoline will go at the pump.

—We don't know if rationing will be necessary.

—We don't know the number of capped wells and what they could contribute to alleviate the shortage.

—We don't know how many independent operators have been driven out of business during this crisis and why.

—We intend to obtain the answers to these questions and the numerous others which will be posed after a detailed examination of the transcript of these hearings and the company's submissions.

This is only the first round in the search for the truth. Some of the information we desire shows the need for a new agency in the Federal Government with a capability for sophisticated data processing and analysis, as would be established by the Energy Information Act that Senator Nelson and I have introduced. Other information this Subcommittee received will be used for legislative purposes over the coming weeks.

Today I will ask the companies represented here to furnish the Committee with complete information on their import prices and costs, and on the prices they

carry on their books for crude oil—imported and domestic—which they or their affiliates produce and run in their own refineries.

The companies will be asked to disclose to the Committee, and to the American people, the total value to them, and cost to the Treasury, of the special tax preferences they receive under federal tax laws and IRS regulations.

I will also ask for specific data and documents which provide justification for the cost pass throughs which are permitted by the Federal Energy Office.

EXHIBIT H

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Commissioners: Lewis A. Engman, Chairman
Paul Rand Dixon
Mayo J. Thompson
M. Elizabeth Hanford
Stephen A. Nye

Docket No. 8934

IN THE MATTER OF
EXXON CORPORATION, a corporation, ET AL.

ORDER DENYING RECONSIDERATION

By order dated February 1, 1974, the Administrative Law Judge properly certified to the Commission certain oral and written motions to dismiss the complaint in this matter on the grounds that (1) the Commission lacked reason to believe respondents had violated the law at the time it issued the complaint and (2) the proceeding is not in the public interest. The Commission denied these motions by order of February 12, 1974, and respondents now urge reconsideration on those same grounds and, in addition, on an alleged denial of due process and the fact that complaint counsel are pursuing additional post-complaint investigation. Complaint counsel urge the Commission to grant the request for reconsideration and clarify its policy in the area of post-complaint investigations.

Respondents' argument that Congressional interest rather than the public interest prompted the issuance of this complaint is misplaced. None of the communications

received by this agency from any member of Congress is even remotely of the character deemed improper by the courts. *Pillsbury* v. *FTC*, 354 F.2d 952 (5th Cir. 1966); *D.C. Federation of Civic Associations* v. *Volpe*, 459 F.2d 1231 (D.C. Cir. 1971). And it has long been settled that the adequacy of the Commission's "reason to believe" a violation of law has occurred and its belief that a proceeding to stop it would be in the "public interest" are matters that go to the mental processes of the Commissioners and will not be reviewed by the courts. Once the Commission has resolved these questions and issued a complaint, the issue to be litigated is not the adequacy of the Commission's pre-complaint information or the diligence of its study of the material in question but whether the alleged violation has in fact occurred. That is the posture of the instant matter.

Nor is there any merit in respondents' argument on the issue of post-complaint investigation. As we have said many times before and reiterated most recently in *Food Fair Stores, Inc.*, Docket 8935, Order of April 23, 1974, the division of the Commission's total investigative effort between the pre-complaint and post-complaint stages is entirely a housekeeping matter between the Commission and its staff, not one that can be used to challenge a post-complaint subpoena or the sufficiency of the Commission's pre-complaint investigation and hence of its "reason to believe" a violation has occurred. Post-complaint discovery by complaint counsel is entirely proper and the sole limits on its proper scope are the requirements of due process that govern in any judicial proceeding, e.g., definiteness of the demand, relevance of the data sought to the issues raised in the pleadings, etc. *United States* v. *Morton Salt Co.*, 338 U.S. 632, 641 (1950). Nothing in the papers before us suggest that complaint counsel in this proceeding have exceeded these bounds in their discovery efforts.

The Commission finds no grounds here for reconsidering its prior denial of respondents' motions to dismiss the complaint in this matter. Accordingly,

IT IS ORDERED that respondents' motions for reconsideration be, and they hereby are, denied.

By the Commission. Commissioner Nye did not participate.

[SEAL]

/s/ Charles A. Tobin
CHARLES A. TOBIN
Secretary

ISSUED: June 4, 1974

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil No. C-75-0860-LHB

STANDARD OIL COMPANY OF CALIFORNIA, PLAINTIFF

v.

FEDERAL TRADE COMMISSION; LEWIS A. ENGMAN, Chairman; PAUL RAND DIXON, Member; MAYO J. THOMPSON, Member; STEPHEN A. NYE, Member, DEFENDANTS

MOTION TO DISMISS

Defendants, the Federal Trade Commission and its individual Commissioners, by and through their undersigned attorneys, move this Honorable Court to dismiss the complaint and action herein, on Friday, July 25, 1975 at 11:00 a.m., in Courtroom No. 6, 17th Floor, United States District Court, 450 Golden Gate Avenue, San Francisco, California.

The grounds for this motion are that the Court lacks jurisdiction over the subject matter (Rule 12(b)(1), FRCivP); and that plaintiff has failed to state a claim upon which relief can be granted (Rule 12(b)(6), FR Civ).

Dated: July 3, 1975

JAMES L. BROWNING, JR.
United States Attorney

By: /s/ Stephen A. Shefler
STEPHEN A. SHEFLER
Assistant United States Attorney
Civil Division

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Before: HONORABLE LLOYD H. BURKE, Judge

C 75-0860 LHB

STANDARD OIL COMPANY OF CALIFORNIA, PLAINTIFF

—*vs*—

FEDERAL TRADE COMMISSION; LEWIS A. ENGMAN, Chairman; PAUL RAND DIXON, Member; MAYO J. THOMPSON, Member; STEPHEN A. NYE, Member, DEFENDANTS

REPORTER'S TRANSCRIPT

Friday, September 26, 1975

Defendants' Motion to Dismiss

[60] THE COURT: Well, I think that under some circumstances the District Court can entertain a complaint of the type which is presented in this action.

I think the circumstances under which such jurisdiction would apply would normally be unusual at least.

The allegations here are no more than a reference, substantial language, to political pressures which were applied to members of the Commission. The accuracy of that conclusion may or may not be debatable. I don't intend to make any such attempt.

I am inclined to be under the view there was kind of more than casual influence, political or otherwise, applied in connection with the Commission decision in this case. The fact that such influence was applied does not necessarily mean that it was improper. I think the function of the legislators, state and federal, is at least in part to make their views known to administrative agencies and those who are responsible for the mechanics of government.

Here, I don't believe that the complaint suggests anything which brings the action within the scope of either Jewel or Volpe.

I am in agreement with the suggestion of government counsel that a review of preliminary decisions made by administrative agencies, except under most unusual circumstances, would be productive of nothing more than chaos.

[61] Under the circumstances, I don't believe that this court should exercise any power such as may exist, to the extent that it may exist. The complaint doesn't warrant it.

Motion is granted.

Will you submit the order, Counsel.

* * * *

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 75-3678

STANDARD OIL COMPANY OF CALIFORNIA,
PLAINTIFF-APPELLANT

v.

FEDERAL TRADE COMMISSION; LEWIS A. ENGMAN, Chairman; PAUL RAND DIXON, Member, MAYO J. THOMPSON, Member, MARY ELIZABETH HANFORD, Member, STEPHEN A. NYE, Member, DEFENDANTS-APPELLEES

May 18, 1979

Appeal from the United States District Court for the Northern District of California.

Before ELY, CARTER and TANG, Circuit Judges.

TANG, Circuit Judge.

Standard Oil Company of California (SOCAL) appeals from a judgment dismissing an action in which SOCAL sought review of certain aspects of the Federal Trade Commission's (FTC) decision to issue an administrative complaint under § 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b) (1970) (amended Supp. V 1975). The issue raised is to what extent the provisions of the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (1976), allow the district court to review the FTC's stated determination that it has "reason to believe" that SOCAL is engaged in monopolistic practices in violation of law. Under 15 U.S.C. § 45(b), this "reason to believe" determination is a prerequisite to the issuance of an FTC complaint.[1] We conclude here that

---

[1] Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b) (1970) (amended Supp. V 1975), provides as relevant:

> Whenever the Commission shall have reason to believe that any . . . corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce . . . it shall issue and serve upon such . . . corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint.

what constitutes "reason to believe" is unreviewable because the "reason to believe" determination is committed to the FTC's discretion. However, we also conclude that the issue whether the FTC did or did not in fact make a "reason to believe" determination is reviewable.

FACTS

Because SOCAL's complaint was dismissed for failure to state a claim upon which relief can be granted, the following facts alleged in SOCAL's complaint must be accepted as true. *East Oakland-Fruitvale Planning Council* v. *Rumsford*, 471 F.2d 524, 527 (9th Cir. 1972).

In December 1971, the FTC issued a resolution stating its intention to investigate whether the petroleum industry was engaged in unfair trade practices. Seventeen months passed and the FTC made no apparent effort to investigate SOCAL either through examination of its officers or employees or through review of corporate records. Then, on May 31, 1973, Senator Henry M. Jackson, Chairman of the Senate Interior and Insular Affairs Committee and of the Permanent Investigation Subcommittee of the Senate Committee on Government Operations, sent a letter to FTC Chairman, Lewis A. Engman, requesting that, within 30 days, the FTC provide a report on the relation between the petroleum and related industries and the current and prospective shortages of petroleum products. One day after the letter was sent, the FTC issued subpoenas to three SOCAL officers and shortly thereafter on July 6, 1973, the FTC issued SOCAL a subpoena duces tecum to produce certain corporate books and records.

On July 6, 1973, the FTC also responded to Senator Jackson's request for a report by transmitting to him an undated document entitled "Preliminary Federal Trade Commission Staff Report on Its Investigation of the Petroleum Industry." Chairman Engman's letter accompanying the report stated: "This report has not been evaluated or approved by the Commission, and the findings and conclusions contained in the report do not necessarily reflect the views of the Commission."

On July 13, Senator Jackson released the preliminary FTC report for publication as a committee print. In the week following, the FTC issued complaint number 8934 charging SOCAL and seven other oil companies with various antitrust violations. However, just two days prior to Senator Jackson's release of the report for publication, Chairman Engman had warned that publication of the report would be "inconsistent with [the FTC's] duty to proceed judiciously and responsibly" in determining what, if any, further action should be taken by the FTC.

Prior to the filing of its district court complaint, SOCAL sought relief in the administrative proceeding. In January 1974, SOCAL filed a motion in the FTC proceeding for dismissal of the complaint without prejudice. It argued that Congressional pressure alone had led to the premature termination of the FTC investigation and that the FTC had issued the complaint without "reason to believe" SOCAL had committed a violation. In February, after an administrative law judge certified SOCAL's motion to the FTC, the motion was denied. Later the FTC refused SOCAL's motion for reconsideration.

This action was filed in May 1975. SOCAL prayed that the district court compel the FTC to withdraw or dismiss the administrative complaint. SOCAL claimed that the FTC had arbitrarily and capriciously issued the complaint without facts sufficient to warrant a reasonable belief that SOCAL had violated the law. SOCAL also claimed that, in deciding to issue the complaint, the FTC had improperly considered Congressional pressure and legally irrelevant political and economic factors.

SOCAL also pleaded other facts to support its claim that the agency lacked "reason to believe" SOCAL had violated the Act. For example, counsel for the FTC was unable to provide a satisfactory list of witnesses or documents as ordered by the administrative law judge. Apparently, the FTC did not have even one proposed witness to be called in the proceeding. Also, in light of the FTC's discovery problems, the administrative law judge had recommended in October 1974 that the FTC

withdraw the complaint pending further investigation. The FTC rejected this suggestion.

In sum, SOCAL claimed that the FTC had abused its power to issue complaints under 15 U.S.C. § 45(b). The district court, however, dismissed SOCAL's action on grounds that it did not have authority to inquire into what constituted "reason to believe" under 15 U.S.C. § 45(b).

DISCUSSION

SOCAL argues that it is entitled to relief under the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706. The FTC is an agency subject to the APA. *United States* v. *Morton Salt Co.*, 338 U.S. 632, 644, 70 S.Ct. 357, 94 L.Ed. 401 (1950). Moreover, as SOCAL pleaded, the district court had jurisdiction under 28 U.S.C. § 1331. *See Califano* v. *Sanders*, 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977).

Nevertheless, the FTC claims that the issuance of the Administrative complaint is not within the purview of the APA because it is not "agency action" under 5 U.S.C. §§ 551(13) and 702.[2] We disagree. The language of § 551(13) admits of the interpretation that the subsection is illustrative rather than exclusive. Moreover, Congress has manifested its intent that the APA cover a "broad spectrum of administrative actions." *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967). Consequently, the APA's generous review provisions are given a hospitable interpretation. *Id.* at 140-41, 87 S.Ct. 1507. There is also a presumption of judicial review under the APA unless there

---

[2] The cited statutes provide as relevant:

> "[A]gency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.

5 U.S.C. § 551(13).

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

5 U.S.C. § 702.

is clear and convincing evidence that Congress intended to foreclose review of a final agency action either by a specific statute or by committing action to agency discretion. *See, e.g., Morris* v. *Gressette*, 432 U.S. 491, 500-01, 97 S.Ct. 2411, 53 L.Ed.2d 506 (1977); *Dunlop* v. *Bachowski*, 421 U.S. 560, 567, 95 S.Ct. 1851, 44 L.Ed. 2d 377 (1975); *Abbott Laboratories* v. *Gardner*, *supra*, 387 U.S. at 140, 87 S.Ct. 1507; *Washington* v. *United States Environmental Protection Agency*, 573 F.2d 583, 587 (9th Cir. 1978); *Montana Chapter of Association of Civilian Technicians, Inc.* v. *Young*, 514 F.2d 1165, 1168 (9th Cir. 1975). Therefore, the relevant question is not whether the FTC's issuance of complaint number 8934 is "agency action" as to SOCAL—for almost any act an agency takes can be "agency action"—but whether, under the APA, it is reviewable agency action. The latter inquiry triggers the following questions: first, whether a statute precludes judicial review, 5 U.S.C. § 701(a)(I); second, whether agency action is committed to agency discretion by law, 5 U.S.C. § 701(a)(2); and third, whether there is final agency action for which there is no adequate judicial remedy other than review under the APA.[3]

There is no statute precluding judicial review of the FTC's determination that there is "reason to believe" the charged party has violated the law. Therefore, inquiry proceeds to whether the "reason to believe" determination lies entirely within the FTC's discretion. 5 U.S.C. § 701(a)(2). The APA's exception for actions committed to agency discretion applies "in those rare instances

---

[3] The cited statutes provide as relevant:

> This chapter [5 U.S.C. §§ 701-706] applies, according to the provisions thereof, except to the extent that—
>
> (1) statutes preclude judicial review; or
> (2) agency action is committed to agency discretion by law.

5 U.S.C. § 701(a).

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.

5 U.S.C. § 704.

where 'statutes are drawn in such broad terms that in a given case there is no law to apply.' " *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 410, 91 S.Ct. 814, 821, 28 L.Ed.2d 136 (1971). When no law fetters the exercise of discretion, the courts have no standard by which to measure the lawfulness of agency action, and consequently, the action is not susceptible to judicial review. *City of Santa Clara* v. *Andrus*, 572 F.2d 660, 666 (9th Cir. 1978), *cert. denied*, —— U.S. ——, 99 S.Ct. 177, 58 L.Ed.2d 167 (1978).

Under this standard, a determination by the FTC that there is "reason to believe" a violation of law has occurred is within the agency's discretion and not reviewable in the district court under the APA. In *Hills Bros.* v. *Federal Trade Commission*, 9 F.2d 481, 483-84 (9th Cir.), *cert. denied*, 270 U.S. 662, 46 S.Ct. 471, 70 L.Ed. 787 (1926), this Court stated that a determination that an FTC complaint would be in the public interest, like the determination that there is "reason to believe" the law has been violated, lies within the FTC's discretion. Later case law upholds the validity of this early statement. Section 5 of the Federal Trade Commission Act is a broad delegation of power by Congress to the FTC. The Act empowers the FTC to determine in the first instance whether a method of competition or an act or practice is unfair. *See, Atlantic Refining Co.* v. *Federal Trade Commission*, 381 U.S. 357, 367, 85 S.Ct. 1498, 14 L.Ed.2d 443 (1965); *United States* v. *Morton Salt Co., supra*, 338 U.S. at 640-41, 70 S.Ct. 357. The necessary companion to the FTC's power to develop in the first instance the meaning of the statutory term "unfair" is the power to determine whether there is "reason to believe" that a party is engaged in "unfair" conduct. Judicial intervention in this legitimate decision making process would serve only to hamper or thwart the FTC's exercise of the power granted to it by Congress.

However, the facts alleged in SOCAL's complaint do not allow inquiry to end with our conclusion that the determination of what constitutes "reason to believe" is committed to the FTC's discretion. The rule of *Citizens to Preserve Overton Park, Inc.* v. *Volpe, supra*, provides

that judicial review is foreclosed when there is no law to apply in a "given case." Accordingly, a complaint in a given case must be examined to see whether it raises claims for which there is law to apply. *Strickland* v. *Morton*, 519 F.2d 467, 471 (9th Cir. 1975). In this respect, the courts will review an agency action when the alleged abuse of discretion is the violation of "constitutional, statutory, regulatory or other legal mandates or restrictions." *Ness Investment Corp.* v. *United States Department of Agriculture*, 512 F.2d 706, 715 (9th Cir. 1975). *See also City of Santa Clara* v. *Andrus*, *supra*, 572 F.2d at 666. Such issues must be reviewed "though other aspects of the agency action may be committed to the agency's expertise and discretion." *East Oakland-Fruitvale Planning Council* v. *Rumsford*, *supra*, 471 F.2d at 533.

Under the above standard, there is a reviewable issue in this case. A restriction on the FTC's discretion is embodied in the very terms of 15 U.S.C. § 45(b). The FTC must first in fact make a "reason to believe" determination that the law has been violated. *See Hunt Foods and Industries, Inc.* v. *Federal Trade Commission*, 286 F.2d 803, 806 (9th Cir.), *cert. denied*, 365 U.S. 877, 81 S.Ct. 1027, 6 L.Ed.2d 190 (1961). The restriction provides "law to apply" in this case because SOCAL claims that the FTC disregarded the restriction and acted outside the term of the statute. SOCAL claims that FTC complaint number 8934 was hurriedly issued with hardly any precomplaint investigation of SOCAL and under the pressure of outside influences. In short, SOCAL claims that the FTC did not make and, in the circumstances, could not have made the "reason to believe" determination despite a recitation on the face of the FTC complaint that the determination had been made.

The allegations in SOCAL's complaint and the reasonable inferences from the allegations support SOCAL's claim. As alleged, no investigation of SOCAL occurred for 17 months after the FTC had resolved to investigate the petroleum industry. Then, immediately after the reception of Senator Jackson's request, the FTC took the testimony of three SOCAL officers. Shortly thereafter,

the FTC subpoenaed SOCAL records. But at the same time the subpoena issued, the FTC sent Congress a report which, as FTC Chairman Engman expressly stated, had not been evaluated or approved by the FTC. Chairman Engman also stated that publication of the report would be inconsistent with the FTC's duty to proceed judiciously and responsibly. Nonetheless, within a few days of publication, complaint number 8934 issued naming SOCAL as a respondent. All the above described events occurred in the brief period May 30 to July 18, 1973. Moreover, after administrative proceedings on the complaint had commenced, the FTC ran into severe discovery difficulties. This led the administrative law judge to suggest that the FTC might wish to consider dismissing the complaint so that a fuller investigation could take place.

Considering the alleged timing and circumstances, SOCAL's allegations are sufficient to raise the claim that the FTC either acted without deliberation as to SOCAL or felt itself goaded into action by outside influences. Because FTC complaints should not issue other than as prescribed in 15 U.S.C. § 45(b), SOCAL's claims should be reviewed. However, we emphasize that review is limited. It cannot extend to an assessment by the district court of what constitutes "reason to believe" but simply whether the FTC disregarded the mandate and restriction of 15 U.S.C. § 45(b) by not even making a "reason to believe" determination at all.

If the district court finds as a fact that the FTC made the "reason to believe" determination albeit with outside pressures, then it can be concluded that the FTC has complied with 15 U.S.C. § 45(b) and further review would be foreclosed. If on the other hand the district court finds that the complaint was issued solely because of outside pressure or with complete absence of a "reason to believe" determination, then the FTC has not complied with the Act.

We must further determine whether there has been a "final agency action" as to SOCAL for which there is no adequate judicial remedy other than review under the APA. The finality element in 5 U.S.C. § 704 should be interpreted in a "pragmatic" way. *Abbott Laboratories*

v. *Gardner, supra,* 387 U.S. at 149, 87 S.Ct. 1507. If possible, statutory finality requirements in general should not be construed so as "to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered." *Mathews* v. *Eldridge,* 424 U.S. 319, 331 n. 11, 96 S.Ct. 893, 901, 47 L.Ed. 18 (1976). In this case, SOCAL has exhausted administrative remedies by raising its claim before the FTC. SOCAL is presently obligated to respond in administrative proceedings that allegedly have been initiated in an unlawful manner. Without review now, the alleged unlawfulness is likely to become insulated from any review. If SOCAL should prevail in the FTC proceedings, the claims raised now would become moot and, therefore, unreviewable. Moreover, assuming that a court of appeals could properly entertain SOCAL's present claims upon review of a cease and desist order under 15 U.S.C. § 45(c), it is unlikely that the record of the completed administrative proceedings would be sufficient to determine the claims for the simple reason that the FTC has already rejected them on legal grounds and thus foreclosed SOCAL from developing relevant facts. Furthermore, an appellate court would proceed to consider only whether the FTC order is supported by the evidence and a reasonable legal theory, and, therefore, would have no reason to reach the issue raised by SOCAL of an unlawful complaint. 15 U.S.C. § 45(c); *Atlantic Refining Co.* v. *Federal Trade Commission, supra,* 381 U.S. at 367-68, S.Ct. 1498. We therefore find that the issuance of the FTC complaint number 8934 was a "final agency action" as to SOCAL.

CONCLUSION

The judgment of the district court is vacated and the case is remanded for proceedings consistent with this opinion.

JAMES M. CARTER, Circuit Judge, concurring and dissenting:

(1) I concur in that portion of Judge Tang's opinion holding that a determination by the Federal Trade Commission (hereafter "FTC") that there is "reason to be-

lieve" a violation of law has occurred, is within the agency's discretion and not reviewable in the district court under the Administrative Procedure Act (hereafter "APA"). (2) I dissent from the holding that there is reviewable by the court the question as to whether the FTC did or did not make a "reason to believe" determination. (3) I also dissent from the holding that FTC's action was "final action" and thus reviewable.

The Remand to Determine if the FTC Made a Determination

The opinion should have ended after point (1) above. In my opinion the discussion of the additional points (2) and (3) above referred to is foreclosed by what the majority decided as to the first point. If the "reason to believe" decision is not reviewable, then it seems wrong to me to decide whether the FTC did or did not make a "reason to believe" determination is reviewable. Had the first point been decided otherwise, namely, that the determination as to "reason to believe" a violation had occurred was reviewable, then, of course, it would follow there could be reviewed also the question as to whether or not the FTC did actually make a "reason to believe" determination. But since the majority held that the "reason to believe" decision was not reviewable but rested in agency discretion, it seems wrong to me to hold, as the majority does, as to the second point.

The government's brief demonstrates the rule that action by the FTC in starting a proceeding is agency action committed to agency discretion. The law is based upon the general theory of prosecutorial discretion and the APA exception for agency discretion. Thus judicial review of prosecutorial discretion in the administrative area is generally rejected, whether the agency's decision is for prosecution (*e.g.*, *Miles Laboratories, Inc.* v. *FTC*, 50 F.Supp. 434 (D.D.C. 1943), *affirmed*, 78 U.S.App. D.C. 326, 140 F.2d 683, *cert. denied*, 322 U.S. 752, 64 S.Ct. 1263, 83 L.Ed. 1582 (1944); *Hills Bros* v. *FTC*, 9 F.2d 481 (9 Cir.), *cert. denied*, 270 U.S. 662, 46 S.Ct. 471, 70 L.Ed. 787 (1926)), or whether the agency's deci-

sion is against prosecution (*e.g.*, *Vaca* v. *Sipes*, 386 U.S. 171, 182, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967) (NLRB) (dictum); *Kixmiller* v. *SEC*, 160 U.S.App.D.C. 375, 379, 492 F.2d 641, 645 (1974)).

In such cases the regularity of prosecutorial discretion is generally assumed. Only the most unusual and compelling circumstances, which must be specially pleaded, will permit inquiry into whether the prosecutor's conduct falls outside the discretion permitted to him and be subject to review. *See Yick Wo* v. *Hopkins*, 118 U.S. 356, 373-74, 6 S.Ct. 1064, 30 L.Ed. 220 (1886); *United States* v. *Steele*, 461 F.2d 1148 (9 Cir. 1972). No such facts are pleaded in this case.

In *Hills-Bros.* v. *FTC, supra*, this circuit held that notwithstanding the "reason to believe" standard in the FTC Act, the discretion of the FTC to issue complaints was no different from other generally nonreviewable prosecutorial determinations. It held it was not necessary for the FTC to list its specific grounds for its "reason to believe."

Although the APA was enacted in 1946, the provision for exceptions from judicial review "agency action . . . committed to agency discretion by law" was a restatement of existing law. See "Administrative Procedure Act, Legislative History," S.Doc. 248, 79th Congress, 2d Session, 229-30 (1946). Thus the principles set forth in *Hills Bros.* in 1926 were reaffirmed by Congress when it enacted the APA in 1946.

Finally, judicial review of whether FTC made a determination of "reason to believe," etc., would require courts to probe the mental processes of the Commissioners, a procedure disapproved in *United States* v. *Morgan*, 313 U.S. 409, 422, 61 S.Ct. 999, 85 L.Ed. 1429 (1941).

The decision in the case at hand as to the second point, allowing review to determine if the FTC actually made a determination of "reason to believe," would open a can of worms and lead to various appeals of preliminary acts and orders. The decision is incorrect and inconsistent with the prior holding that the "reason to believe" decision is action committed to agency discretion and not reviewable by this court.

With the slight opening for review provided by the second point of this decision, I foresee that there will be attempts in every FTC proceeding to seek review of some preliminary matter. This could cripple FTC's ability to function.

I would hold that since determination of the "reason to believe" issue was committed to agency discretion and exempted from judicial review under 5 U.S.C. § 701(a)(2), and since nothing in plaintiff's district court complaint creates any genuine issue as to the regularity of the Commission's complaint, judicial review of the Commission's decision to issue the complaint is unwarranted and improper.

Final Agency Action Under 5 U.S.C. § 704

The majority also holds that the action of the FTC was final agency action under 5 U.S.C. § 704 (point (3), *supra*). I disagree. The review of the Commission's proceedings should await the final action of the Commission.

In *Gifford-Hill & Co.* v. *FTC*, 173 U.S. App. D.C. 135, 137, 523 F.2d 730, 732 (1975), the court held that a "decision [by the FTC] to institute an adjudicatory proceeding is not an 'agency action'—and most certainly not a 'final agency action'—made reviewable by the [Administrative Procedure Act]." *See also Miles Laboratories* v. *FTC*, 78 U.S. App.D.C. 326, 328, 140 F.2d 683, 685, *cert. denied*, 322 U.S. 752, 64 S.Ct. 1263, 88 L.Ed. 1582 (1944).

In *Chamber of Commerce* v. *FTC*, 280 F. 45 (8 Cir. 1922) the FTC filed a complaint alleging that the Commission had reason to believe that petitioners were engaging in unfair competition. The petitioners sought judicial review of the issuance of the complaint. The court of appeals held that "neither the District Court nor this court has power under the act [FTC] to interfere with the investigation and inquiry of the Commission" (*id.*, p. 48), and dismissed the action. The court's holding was specifically approved by the Supreme Court in *Petroleum Exploration, Inc.* v. *Public Service Comm'n*,

304 U.S. 209, 222, n. 21, 58 S.Ct. 834, 82 L.Ed. 1294 (1938) and i *Federal Power Comm'n* v. *Edison Company*, 304 U.S. 375, 385, 58 S.Ct. 963, 82 L.Ed. 1408 (1938).

Plaintiff contends that the issue of the administrative complaint should be treated as "final" under 5 U.S.C. § 704 and that exhaustion of administrative remedies should not be required, because, in the absence of judicial review at the preliminary stage, the validity of the issuance of the administrative complaint cannot later be reviewed or becomes moot. Plaintiff contends that if the complaint is ultimately dismissed by the Commission, there would be nothing to review; that if the proceedings ultimately result in a cease and desist order, a review is limited to the validity of that order and does not extend to the propriety of the issuance of the underlying complaint, citing *Hills Bros.* v. *FTC*, *supra* (9 F.2d at 484). Thus plaintiff argues that the issuance of the administrative complaint should be deemed "final" for review purposes because, otherwise, there would be "no adequate remedy in a court" for a review of the matter.

The contention is without merit. The issuance of the complaint is a preliminary agency determination and not "final" in any effective sense. Plaintiff's argument is based on a misconception of the purpose and meaning of the "no other remedy" provision in 5 U.S.C. § 704. That provision or condition was not intended to convert preliminary agency decisions that otherwise become moot into final agency actions in order to afford judicial review. Rather, it is designed to exempt "final agency action" from judicial review under the APA if there is an adequate alternative legal remedy. *See, e.g., Warner* v. *Cox*, 487 F.2d 1301, 1304 (5 Cir. 1974). *See generally Richfield Oil Corporation* v. *United States*, 207 F.2d 864, 869, 870 (9 Cir. 7953).

Plaintiff's remedy, which is an adequate one, is to test the validity of the final effective agency action. The cease and desist order is subject to judicial review and the findings of the Commission must be supported by substantial evidence.

Plaintiff is seeking an exception to the rule requiring exhaustion of administrative remedies. APA's limitation of judicial review to cases involving "final agency action" is a codification of the "exhaustion" rule. The rule is justified by "very practical notions of judicial efficiency . . . ." *McKart* v. *United States*, 395 U.S. 185, 194, 195, 89 S.Ct. 1657, 1663, 23 L.Ed. 2d 194 (1969).

Legal expenses in pursuing defenses to administration action (or remedies) is not a sufficient reason to avoid the exhaustion requirement. *Petroleum Exploration Inc., supra* (304 U.S. 209, 222, 58 S.Ct. 963, 82 L.Ed. 1408).

> "To permit judicial review . . . of every procedural, preliminary and interlocutory order or ruling by which a person may consider himself aggrieved, would afford opportunity for constant delays . . . and would render orderly administrative proceedings impossible. Moreover, it would result in bringing to the courts such an avalanche of trivial procedural questions as largely to monopolize their time and energies." *Utah Fuel Co.* v. *National Bituminous Coal Comm'n*, 69 App.D.C. 338, 339, 101 F.2d 426, 432 (1938).

Exceptions to the exhaustion doctrine apply only in "very unusual and limited circumstances," *Lone Star Cement Corp.* v. *FTC*, 339 F.2d 505, 510 (9 Cir. 1964); and require, for one thing, a showing of substantial prejudice, *i.e.*, "irreparable injury." *Renegotiation Board* v. *Bannercraft Co.*, 415 U.S. 1, 24, 94 S.Ct. 1028, 39 L.Ed.2d 123 (1974); *McKart* v. *United States, supra* (395 U.S. at 197, 89 S.Ct. 1657) (incarceration). No irreparable injury to plaintiff is shown in this case.

The decision should be limited to the first point referred to above. I would affirm on that basis alone.

SUPREME COURT OF THE UNITED STATES

No. 79-900

FEDERAL TRADE COMMISSION, ET AL., PETITIONERS

v.

STANDARD OIL COMPANY OF AMERICA

ORDER ALLOWING CERTIORARI

Filed February 25, 1980

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1980 317792 284